exhibit the inventory and the account. The relevant part of the bond as far as this application is concerned, reads as follows:—

"..... and do well and truly administer the said estate, property and credits according to law (that is to say) do pay the debts which the abovenamed deceased *did owe at his decease* ..... and pay unto such person or persons as shall be entitled thereto ....."

The breach alleged by the plaintiffs is that the administratrices had sold a piece of land (land held under Lease No. 14006 for Lot No. 485 Machap, Malacca) for $11,678 whereas the Collector of Estate Duty had assessed its value at $17,678. The administratrices, however, had on the 21st day of November 1966 in originating summons 50 of 1966 obtained leave of the court to sell and transfer this land for a sum of not less than $11,475. There is consequently no merit in that allegation of the plaintiffs. Whether there was any fraudulent preference by the administratrices in the payment of the debts of the deceased is a matter which is not before me. The bond speaks of the debts of the deceased at the time of his death. Judgments obtained by the plaintiffs were not debts subsisting at the date of the death of the deceased or even on the day the administration bond was executed by the defendants. The liability of the estate of the deceased to the plaintiffs had not as on that day either been determined by the court or as it seems ever asserted by the plaintiffs.

The complaint of the plaintiffs is that they have little prospects of recovery of the amount for which they have obtained judgments. I do sympathise with the plaintiffs. My duty, however, is to administer the law as it stands. In fact, the plaintiffs in Civil Suit Nos. 120, 95 and 123 of 1965 did obtain an order under Order 42 rule 32 of the Rules of Supreme Court for the examination of the first two defendants and the parties appeared before the Registrar in pursuance of that order on the 16th day of December 1967 and the 20th day of January 1968 when at the request of counsel for the plaintiffs in those suits the matter was adjourned *sine die.*

The affidavits filed in support of the application do not, to my mind, disclose any *prima facie* evidence of any breach of conditions of the bond by the first two defendants. The application is consequently dismissed with costs.

Application dismissed.

Solicitors: *Murphy & Dunbar; Koh Kim Leng & Co.*

COMPTROLLER OF INCOME TAX, MALAYA v. O.M.

[A.C.J. (Abdul Aziz J.) September 29, 1969]

[Kuala Lumpur — Civil Appeal No. 14 of 1968]

Income Tax — Deductions — Fares and rents — Income Tax Ordinance 1947, ss. 10(2) (a) & (c) and 14.

The comptroller appealed against the decision of the Board of Review which decided that for ascertaining the taxable income of the respondent for the year of assessment 1965-1966 a sum of $8,000 being passage expenses for the respondent and his family and the monthly rental of $800 in respect of a house occupied by the respondent should be deductible from the gross income.

Held, allowing the appeal: (1) the perquisities in the form of fares and rents could only be deducted if they fall within section 14 of the Income Tax Ordinance, 1947 and this must be decided on the basis whether they were "outgoings and expenses wholly and exclusively incurred during that period by such person in the production of the income";

(2) in this case the board was wrong in allowing the deductions for the fares and the rent.

Cases referred to:—

(1) *Cordy (H.M. Inspector of Taxes)* v. *Gordon* 9 T.C. 304.

(2) *Machon (H.M. Inspector of Taxes)* v. *McLoughlin* 11 T.C. 83.

CIVIL APPEAL

R. Padmanathan (Federal Counsel) for the appellant.

N.A. Marjoribanks for the respondent.

Cur. Adv. Vult.

Abdul Aziz J.: This is an appeal against the decision of the Income Tax Board of Review which reads:—

"*Judgment*

Appellant entitled to cost of 1st class passages.

As rental follow sec. 10(2)(c).

Each party to pay his own costs.

Sgd. Kam Woon Wah
Hew Kiang Main
Raja Kamaruddin."

The main ground of appeal is that the board erred in law in deciding that for ascertaining the taxable income of the respondent for the year of assessment 1965-1966 a sum of $8,000, being passage expenses for the respondent and his family and the monthly rental of $800 in respect of the house occupied by the respondent, should be deductible from the gross income.

The passage money and the house rents are regulated by a service contract, clause 2 of which reads as follows:—

"By way of remuneration the surgeon shall be entitled to all professional fees earned by him with a minimum of $5,000 per month which sum shall include:

(i) The cost of first class passages by sea or air for the surgeon, his wife and his children once in every 12 months; and

(ii) Provision for a house suitable for the standard of the surgeon and his family; and

(iii) The cost of a telephone in the said house;

which said expenditure would otherwise be borne by the principal by separate accounts."

Whether they are income and, therefore, taxable would depend on its true interpretation. The board, however, applied a test unknown to law and unsupported by evidence when it said:—

"Having heard the parties and on the evidence before us the board holds that the intention of the principal and the surgeon is abundantly clear: the surgeon shall be remunerated on the same basis as when he was in government service viz. the surgeon shall receive a salary/fee in addition to free passage and housing."

In the first place, there is nothing in the evidence or in the service contract to support such a proposition. In the second place, irrespective of whether the employee is in Government service or not, the perquisites in the form of fares and rents could only be deducted if they fall within section 14 of the Income Tax Ordinance, 1947 and it must be decided on the basis whether they were "outgoings and expenses wholly and exclusively incurred during that period by such person in the production of the income, ..." 'Income' under section 10(1)(b) includes "gains or profits from any employment". 'Gains or profits from any employment' is defined under section 10(2)(a) as:—

"Any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance ..... paid or granted in respect of the employment whether in money or otherwise; ....."

In the instant case, the employer guarantees a minimum earning of $5,000 which would include the cost of passage and rent of a house which according to my interpretation of the words underlined in clause 2, would otherwise be payable as a separate payment by the employer. If he avails himself of these rights, the costs would be borne by him from the income. If he does not, his earning would be undiminished. Section 10(2)(a), which is in *pari materia* with the English law, has been interpreted in two English cases, the facts of which are somewhat similar to the present case.

In *Cordy (H.M. Inspector of Taxes) v. Gordon*,[1] a man and wife were employed at an asylum at separate fixed salaries payable weekly. Under the terms of their employment, the institution provided them with board, lodging, washing and uniform for which they were required to pay amounts varying with the cost of living, such amounts being deducted from their gross salaries before payment. Held, that the husband was assessable to income tax in respect of the gross amount of the remuneration of himself and his wife without any deduction for the amounts paid in respect of the board, lodging, etc., provided by the institution. Rowlatt J. in his judgment stated:—

"Whether you said a man was paid £150 with board and lodging thrown in, or £200 subject to a deduction of £50 in respect of board and lodging, would be stating the same thing in different words. But in this case I think there is this distinction, that here he is expressed to be paid a gross salary and is to pay back out of that in respect of the board and lodging which he is bound to take from his employers, not a fixed sum but a sum which varies according to the cost of living; ...."

He went on to say:—

"..... it is clear enough from the case that what he is getting is a gross salary and that he has to spend a variable part of that in a particular way for all these things taken together. The true result, therefore, is that the gross amount is his salary and not that his salary is a variable one, within limits, dependent upon the cost of living."

Rowlatt J. repeated the same thing in the case of *Machon (H.M. Inspector of Taxes) v. McLoughlin*.[2] At page 89, he said:—

"I do not want to repeat what I said in *Cordy* v. *Gordon* (9 T.C. 304), although I still look at the matter in the same way. If a person is paid a wage with some advantage thrown in, you cannot add the advantage to the wage for the purpose of taxation unless that advantage can be turned into money. That is one proposition. But when you have a person paid a wage with the necessity — the contractual necessity if you like — to expend that wage in a particular way, then he must pay tax upon the gross wage, and no question of alienability or inalienability arises."

On appeal to the Court of Appeal (Lord Hanworth M.R. and Warrington and Sargant L.JJ.), the proposition of Mr. Justice Rowlatt was confirmed.

In the respondent's case, there is no doubt from the evidence that he was to get a minimum salary of $5,000 a month either from the fees that he collected or from the fees plus supplement to be paid by Assunta Hospital. If he went on leave, expenses of $8,000 would be deducted from the fees. If he did not go on leave, then, of course, the whole of his salary will be taxable. The question is: Since he went on leave in 1964, could he be entitled to deduct the amount under section 14 as expenses incurred in the production of the income? Obviously, he could not.

It has been conceded that no deduction of the rent is possible except as provided under section 10(2)(c)(i).

In the circumstances, the order of the Board of Review shall be annulled and the assessment as made by the comptroller restored. The costs of this appeal and the proceedings before the board shall be paid by the respondent.

Appeal allowed.

Solicitors: *Lovelace & Hastings.*